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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Landworks Creations, LLC,)
 Plaintiff,)
)
)
vs.) Case No. 05cv40072-FDS
)
)
United States Fidelity and)
Guaranty Company,)
 Defendant.)

BEFORE: The Honorable F. Dennis Saylor, IV

Pretrial Conference

United States District Court
Courtroom No. 2
595 Main Street
Worcester, Massachusetts
April 29, 2008

Marianne Kusa-Ryll, RDR, CRR
Official Court Reporter
United States District Court
595 Main Street, Room 514A
Worcester, MA 01608-2093
508-929-3399
Mechanical Steno - Transcript by Computer

1 APPEARANCES:

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5 for the Plaintiff

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11 for the Defendant United States Fidelity and Guaranty Company
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P R O C E E D I N G S

THE CLERK: All rise.

Court is now open. You may be seated.

Case No. 05-40072, Landworks Creations versus United States Fidelity and Guaranty Company.

Counsel, please note your appearance for the record.

MR. MELTZER: Good afternoon, your Honor. Rob Meltzer for the plaintiff.

THE COURT: Good afternoon.

MR. HERMES: Good afternoon, your Honor. Peter Hermes for the defendant, United States Fidelity and Guaranty Company.

THE COURT: Good afternoon. All right. This is a pretrial conference in this case. The principal matters I want to address are whether or not this is a bench or a jury trial, how long the trial is going to be, and to try to set a date for that trial.

Let me start with the first issue. Mr. Meltzer, what's -- is this a jury trial?

MR. MELTZER: Absolutely, your Honor, this is certainly a jury trial. The predominant part of the case is a case under contract. It's a case that involves a substantial issue of material facts for contract performance. There's also a counterclaim, which is a contract claim. Under the Sixth Amendment, we have a right to a jury trial, and we have asked

1 for a jury trial.

2 THE COURT: Mr. Hermes.

3 MR. HERMES: Your Honor, the plaintiff's claim under
4 Chapter 149, Section 29 is by definition a statutory creation
5 and stated to be under the statute an equity claim. The
6 Chapter 93A claim, similarly, is a creature of statute in the
7 Commonwealth of Massachusetts and subject to trial by the
8 court. I think I'll leave it at that, your Honor.

9 MR. MELTZER: Your Honor, I disagree with that
10 position. If I may, your Honor. If equitable is a statutory
11 remedy to the extent of payment under the bond is an equitable
12 remedy. The issues of contract in a counterclaim are similarly
13 a standard Massachusetts contract claim. A ratification
14 agreement between the parties is a construction contract,
15 performances of services and goods, and it must be done by a
16 jury. We've asked for a jury.

17 THE COURT: Mr. Hermes, let me make sure I understand
18 your point. Count 1 is labeled breach of contract, Landworks
19 versus USF and G.

20 And it's vague, to say the least, but why do you say
21 that's not a jury, a breach of contract claim?

22 MR. HERMES: Your Honor, quite frankly, I read that to
23 be a claim for contract in that instance being the bond rather
24 than something else. It is true that there is a ratif -- what
25 I'll call a ratification agreement between Landworks and USF

1 and G that was executed at some point in time, but I believe
2 the contract at issue here is the following contract between
3 Jackson Construction and Landworks.

4 THE COURT: Well, it says here --

5 MR. HERMES: And they raise the right of a bond on
6 there. If -- if the court reads it as asserting a claim under
7 that ratification agreement then Mr. Meltzer is -- well, my
8 argument with respect to the statutory remedy doesn't apply.

9 MR. MELTZER: Your Honor, we don't believe there is a
10 contract between Landworks and Jackson. That's one of the
11 issues here. They've raised it. We dispute that. This is a
12 straight performance bond. It is a construction contract. At
13 that point, the statute provides the mechanism or the remedy
14 and provides for the amounts of the bonds and provides the
15 jurisdiction at which USF and G is performing, that it is a
16 construction contract.

17 THE COURT: All right. Let me --

18 MR. HERMES: I'm -- I'm confused by that statement,
19 your Honor. There's a payment bond here that presumably is the
20 subject of the claim. There is no -- as phrased by Mr.
21 Meltzer, there is no contract between USF and G and with
22 Landworks. It is rather a bond claim with respect to a
23 subcontract between Landworks and a certain authority, but the
24 remedy on the bond, which does away with the third party
25 beneficiary status that one did not otherwise have is a

1 creation of Chapter 149, Section 29.

2 MR. MELTZER: Your Honor, that confuses the two
3 principles. There are two kinds of bonds. There is a payment
4 bond, and there's a performance bond. The work was completed
5 with a general contractor, and it became insolvent, and the
6 surety is now stepping in to make the payment. That would be a
7 jury waived bond claim.

8 This is a case where the work was completed after the
9 failure of Standen, not Jackson. A ratification agreement came
10 in under the performance bond, and it became a construction
11 contract with USF and G to complete it at USF and G's direction
12 and expense. Similar with their counterclaim. They are
13 construction contracts, not posttermination of a general
14 contractor payment bond.

15 THE COURT: All right. I think what I'm going to need
16 to do is --

17 MR. HERMES: Phrased that way, your Honor, I agree
18 with the characterization by Mr. Meltzer.

19 THE COURT: Well, I guess I can do two things. We can
20 accept Mr. Meltzer's claim at face value; in other words, if
21 you say that's the claim, we can go forward on that assumption,
22 or I can get further briefing on it. I'm not sure I can decide
23 this on the fly here without benefit of at least some further
24 motion practice from the parties.

25 What do you think makes sense? I mean we could do

1 that on a relatively tight timetable and in the meantime set a
2 trial date on the assumption it will be a jury trial. A bench
3 trial, you know, is easier to squeeze in.

4 Mr. Meltzer.

5 MR. MELTZER: I guess what confuses me, your Honor, is
6 that's primarily a jury against USF and G, so I'm a little
7 baffled at the argument. I can brief this, but I do believe
8 that it's a matter of constitutional interpretation that
9 especially once the counterclaim is raised, it is no longer a
10 bond issue. It is a construction contract issue. The
11 counterclaim is certainly.

12 THE COURT: Well, I mean there is no question, you
13 know, under the Constitution, there's a right to a jury trial
14 in, you know, claims arising of law rather than equity, but
15 that kind of begs the question is this a law or an equitable
16 claim.

17 MR. MELTZER: If my brother wishes to waive the
18 counterclaim, I'm sure that we would waive the jury.

19 To me, he interposes the counterclaim that it becomes,
20 I think, problematic before it's even considered as jury
21 waived. The counterclaim is what certainly makes it appear as
22 a standard bread and butter, vanilla contract dispute.

23 THE COURT: Mr. Hermes.

24 MR. HERMES: I'm not in a position -- your Honor, I
25 can discuss with that my client. I'm not in a position to

1 waive the counterclaim. I think within short order Mr. Meltzer
2 and I can at least agree on the characterization of the claims
3 and perhaps agree whether the contract-related claims are ones
4 as to which there's a jury.

5 If -- if what Mr. Meltzer is saying there is not a
6 Chapter 149, Section 29 claim here then I agree at least as to
7 that claim there may be -- there is -- whatever that other
8 claim is is an entitlement to a jury trial. I differ with
9 respect to the Chapter 90A aspect -- 93A aspect of this, your
10 Honor.

11 THE COURT: All right. 93A, obviously, is not a jury
12 trial issue. That part of it is easy, and I wouldn't impanel a
13 jury for that claim alone as an advisory jury.

14 On the assumption it's a jury trial, how long do you
15 think the case will take to try, Mr. Meltzer?

16 MR. MELTZER: Are we half days, I believe.

17 THE COURT: It's 9:00 to 1:00, but it's a real 9:00 to
18 1:00. My experience is the cases move at the same pace as they
19 do as a so-called full day.

20 MR. MELTZER: The only concern I have is that it
21 depends if it's streamlined. I suggest that two motions
22 in limine need to be addressed. If both of those are granted,
23 I think it probably would be five days. I said ten in the
24 pretrial that I had provided, but I think that's -- that may be
25 an streamlined.

1 THE COURT: Mr. Hermes.

2 MR. HERMES: Your Honor, Mr. Meltzer's list of
3 witnesses includes virtually every witness that the defendant
4 would call, except for the defendant's expert, Mr. Byl. So, if
5 Mr. Meltzer thinks that he can put -- I'm not certain whether
6 he is saying his case is five and a half days or the entire
7 case is that, but assuming that certain key fact witnesses, who
8 are listed on his memo are called, the defendant's case would
9 be one -- one day, your Honor.

10 THE COURT: All right. Let me take a look at the
11 calendar.

12 All right. This is awfully quick, but I had a case
13 settle, and I have an opening. We were going to impanel on
14 Friday, May 16th, to try the following week. I could certainly
15 work around that, but that's three weeks away.

16 How do counsel feel about that?

17 And this is -- it's not the oldest civil case on my
18 docket, but it's -- it's close. It's in the top ten anyway.

19 MR. HERMES: As it happens, the second half of May is
20 essentially open in my calendar, your Honor, if there's an
21 opening.

22 THE COURT: Mr. Meltzer, can you be ready by then?

23 MR. MELTZER: Yeah, I have one hearing on the 22nd. I
24 have to get that moved. So, the 19th to the 23rd is open as
25 well, as well as the -- Memorial Day is the 26th?

1 THE COURT: Yes.

2 MR. MELTZER: Then I actually will be available.

3 THE COURT: All right. I have a trial scheduled to
4 start on the Monday after Memorial Day. What I would like to
5 do is to try to address this at warp speed; first off, whether
6 we're going to have a jury or not, which will obviously affect
7 quite a bit about how fast this thing proceeds; and second, you
8 say you have some significant motions in limine, Mr. Meltzer.

9 MR. MELTZER: Well, in the pretrials we both
10 submitted, we both have motions in limine on each other's
11 experts. That's would be, you know, what I was raising. We
12 don't think he has the qualifications to testify at the trial
13 in order to qualify him. We believe that excluding him would
14 actually expedite this trial.

15 THE COURT: Well, it sounds like a Daubert hearing.
16 Well, let's see, how quickly can we get this done?
17 Today is Tuesday. Mr. Meltzer, do you think you could get
18 something on file by Friday? Is that too tight?

19 MR. MELTZER: That is a little bit tight. The close
20 of business on Friday, I could have the motion filed.

21 THE COURT: Why don't we do that, and it doesn't have
22 to be perfect. I mean I'll forgive typos and so forth, but I
23 think it makes -- under the circumstances, I've got a pretty
24 full trial calendar for June, July; I'm gone part of August;
25 September and October are ugly; and I would really try to fit

1 this in now. I know you were anxious, Mr. Meltzer, to get this
2 thing resolved; and at the risk of something less than complete
3 perfection on the motion papers, I think I can get the gist of
4 your argument and try to rule.

5 Mr. Hermes, how quickly do you think you could
6 respond? Is Wednesday the 7th enough time?

7 MR. HERMES: Your Honor, if I may, are we speaking of
8 motions in limine with respect to experts, Mr. Byl?

9 THE COURT: Apparently, yes.

10 MR. HERMES: Yes. I believe so, your Honor.

11 THE COURT: All right. Why don't we do that, and
12 then -- Marty, what is --

13 (The Court conferred with Mr. Castles.)

14 THE COURT: All right. And then are you available at
15 2:15 on May the 8th for a hearing on those motions and pretrial
16 matters generally?

17 MR. MELTZER: I'm actually in Worcester Superior on
18 the 8th in the afternoon.

19 MR. HERMES: Yes, your Honor.

20 THE COURT: Shoot. Are you available, Mr.
21 Meltzer -- this is unorthodox -- but at the end of the day,
22 say, 4:45 or five o'clock on Thursday the 8th?

23 MR. MELTZER: I can do that. I'm in Worcester. I can
24 come here afterwards.

25 THE COURT: I think that probably makes the most

1 sense. Okay. Why don't we just say five o'clock on the 8th,
2 and I think those motions need to be any motions in limine
3 concerning the trial, and any motion concerning the jury trial
4 issue, if the parties can't somehow resolve it; and I think
5 that that will need to be our pretrial conference. I'm going
6 to set a later date for the filing of voir dire questions,
7 proposed jury instructions, witness lists, exhibits lists and
8 so forth. I'm going to ask you to file all of that by the end
9 of the day on May the 13th, that is by five -- by five o'clock.
10 But you ought to be prepared to talk about anything that's
11 controversial or that you -- for example, if you have a -- if
12 it is a jury trial, and you have an unusual voir dire question,
13 you ought to be prepared to raise it on the 8th.

14 Now, I'm sorry to being putting you all on such a
15 tight timetable. I just think this makes more sense than any
16 other alternatives, which are not pretty.

17 MR. HERMES: From -- from my perspective, not my
18 client, your Honor, this is the best of times given the
19 schedule for the succeeding time periods, so I have no
20 objection to it.

21 MR. MELTZER: I agree.

22 THE COURT: And again, don't worry about, you know,
23 filing things that might have a typo in it, which I know tends
24 to take 50 percent of -- 90 percent of the time writing
25 something is, you know, perfecting it, but --

1 MR. HERMES: Your Honor, do I take it that if the
2 defendant has a motion in limine that also should be served by
3 the close of business on this Friday?

4 THE COURT: Yes, I think -- I think it's going to have
5 to.

6 MR. HERMES: I mean the one -- the one motion I have
7 in mind with respect to the jury trial is the robust nature of
8 the description of the case. I'm not sure where Mr. Meltzer
9 stops with respect to what might be contract jury and what
10 begins 93A, but I have some definite views with respect to that
11 that I would like the court to consider.

12 THE COURT: Okay. You can raise that by a motion in
13 limine.

14 Again, assuming it's a jury trial, I will hear the 93
15 issues ordinarily at the same time. If there is some reason to
16 have a portion of the trial kept from the jury, that is
17 something that's relevant only to the 93A and might be
18 additional context, I will consider that, but they're
19 ordinarily, you know, intertwined.

20 MR. HERMES: To the extent Mr. Meltzer speaks of other
21 projects, your Honor, a whole project or litigation between a
22 man by the name of Bordieri, who was president of Jackson
23 Construction, it's that sort of thing that Mr. Meltzer may
24 believe is appropriate to 93A, but I don't believe is
25 appropriate to the contract issues. It's that sort of thing,

1 which I am making reference to.

2 MR. MELTZER: The problem is, your Honor, is where
3 they do get intertwined. The problem we have is that one of
4 the primary issues is whether or not USF and G responded not
5 only according to industry standard in terms of defining
6 contract terms, but whether or not they added policy and
7 procedure.

8 In the Hull case that he just mentioned, it was a case
9 that was filed during the same exact time frame. It was a case
10 that ratification was done after litigation was filed. They've
11 claimed that the mere act of filing the lawsuit constitutes
12 abandonment and the right to terminate the contract. By their
13 own policy, that's not the case. So they have to come in sort
14 of fighting abandonment and the usual process of procedure in
15 these kind of cases.

16 THE COURT: I'm not going to decide the question now.
17 I'll let the motion be filed. I will say, as a general
18 proposition, if there is something that is relevant to 93A or
19 176B, or whatever, however it's framed, that would ordinarily
20 and appropriately be heard only by the court, as opposed to a
21 jury, assuming there is a jury on the contract claim. We can
22 have that hearing. That doesn't need to be tied to this
23 schedule. In other words, suppose I agree with Mr. Meltzer
24 that it's relevant, but I also agree that it's not relevant to
25 the contract claims, we can get that testimony in as best we

1 can in an afternoon or some other time. We can deal with that
2 later, if need be. Okay. But I'll wait for the motion and see
3 what the issues are first off.

4 All right. Let's handle it that way then: Motions by
5 the 2nd; responses by the 7th; a hearing at five o'clock on the
6 8th; other pretrial filings due Tuesday the 13th; and I'm going
7 to need to resolve this jury or bench trial issue by the 8th.
8 If the parties want to file anything by that, they're welcome
9 to. And we will, assuming it is a jury, we'll impanel the
10 morning of Friday, May the 16th; and in all likelihood, just
11 for planning purposes, what we will do is we will impanel. We
12 may possibly have opening statements, but we would not have
13 testimony. So the first witness would be called on the 19th.
14 Okay.

15 MR. MELTZER: Your Honor, if may ask one question.

16 THE COURT: Yes.

17 MR. MELTZER: If we could have a trial order issued
18 today pointing out that trial date. I have one date I have to
19 move up my schedule for that week. They are going to want to
20 see an order of the trial being called on the 18th. If you
21 could have something that like that that would be helpful for
22 me.

23 THE COURT: Mr. Castles is going do an electronic
24 order. That's an order of the court, an electronic entry. If
25 that's not good enough let me know, and I'll issue something

1 else.

2 MR. MELTZER: That would be fine.

3 THE COURT: Okay. Anything else, Mr. Meltzer?

4 MR. MELTZER: That should do it, your Honor.

5 THE COURT: Mr. Hermes.

6 MR. HERMES: No, sir.

7 THE COURT: Okay. Thank you. And I appreciate your
8 flexibility and willingness to do it in the time tight.

9 All right. We'll stand in recess.

10 (At 3:38 p.m., court was adjourned.)

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C E R T I F I C A T E

I, Marianne Kusa-Ryll, RDR, CRR, do hereby
certify that the foregoing transcript, consisting of 16 pages
inclusive, is a true and accurate transcription of my
stenographic notes in Case No. 05cv40072, Landworks Creations,
LLC versus United States Fidelity and Guaranty Company, before
F. Dennis Saylor, IV, on April 29, 2008, to the best of my
skill, knowledge, and ability.

/s/ Marianne Kusa-Ryll

Marianne Kusa-Ryll, RDR, CRR

Official Court Reporter